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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34797**

**POST-HEARING STATEMENT OF TOWN OF WILMINGTON  
REGARDING JURISDICTIONAL AND RELATED MATTERS  
IN NEW ENGLAND TRANSRAIL, LLC, d/b/a  
WILMINGTON & WOBURN TERMINAL RAILWAY  
PETITION FOR AN EXEMPTION FROM 49 U.S.C.  
§ 10901 TO ACQUIRE, CONSTRUCT AND OPERATE  
AS A RAIL CARRIER ON TRACKS AND LAND  
IN WILMINGTON AND WOBURN, MASSACHUSETTS**

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Date: April 30, 2007

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The Town of Wilmington submits this statement to respond to assertions made and issues raised at the Board's April 19, 2007 hearing on jurisdictional and related issues

**I. NET's Continuing Ad Hoc Project Modifications, Contradictory Responses And Uncertain Intentions Demonstrate the Need for Advance Permitting and Effective Enforcement.**

NET continues to remake this project on the fly. In its first petition, NET failed to disclose any intention to conduct solid waste processing until it was forced to do so following statements made to MADEP. NET has never explained that omission, which flatly contradicts its current insistence that waste processing is "integral" to a rail project. This Board wisely dismissed that first petition without prejudice to NET re-filing a petition with "complete" and "detailed" information relative to both jurisdictional and environmental issues. However, NET's second petition omitted essential engineering data and asked the Board to have SEA fish through NET's original filings. It is clear

from the recent hearing that NET still is unable and unwilling to make full and coherent disclosure.

At the hearing, NET's counsel acknowledged that he "may have overstated the law." NET initially was unable to respond to Commissioner Mulvey's question whether Massachusetts law compels residential recycling. Further, NET asserted that the proposed facility would receive 100 20-ton truckloads of C & D and MSW each day and compact, process and load them into 20 rail cars. By contrast, its petitions represented that 400, not 100, trucks would be serviced each day. NET has said that 50 percent of its business will involve C & D and MSW. If this refers to materials handling, the figures of 100 and 400 truckloads are inconsistent and unreliable. If this refers to revenue, solid waste would be twice as lucrative as other operations, despite NET's contentions that solid waste processing would not be a special profit center. (This discrepancy also has substantive implications. The volume of truck traffic is crucial to the project's impact on local roads not designed for it, the safety of area residents and commuters, and local air quality.)

In the guise of "clarifying" "mischaracterizations" of its petition by others, NET has filed 11<sup>th</sup> hour supplemental verified statements which disclose new intentions for the project. Thus, NET has listed various non-waste commodities that it purportedly would handle and now has denied any intention to sell the valuable metal scrap that it would extract from waste loads.

Yet, NET still has not stated whether it would, as it once suggested, establish a break bulk facility after gaining approval and commencing operations. As NYS&W noted, new operations on "existing track and new sidings" are not subject to STB review

Such subsequent operations by NET therefore could evade meaningful review, even though they would place significant additional burdens on a troubled site.

NET's continuing pattern of disassembling and backfilling in response to the parties' comments and the Board's inquiries is troubling. These are not isolated or trivial missteps. For example, they are problematic for NET's new proposal to enter into a voluntary agreement with MADEP. Given NET's checkered history of nondisclosures and ad hoc modifications, and the difficulties encountered at existing unregulated waste sites, it cannot be trusted to adhere to promises of future compliance. NET's ad hoc project descriptions should not be met with ad hoc environmental conditions.

## **II. A Negotiated Scheme Would Be Unworkable and Unenforceable, and Sidesteps Wilmington's Interests.**

A negotiated scheme of regulatory control is a red herring. Even apart from NET's credibility gap, such a scheme would be unworkable. NET cites no precedent for regulation-by-contract, the Board's role would be uncertain, MADEP therefore has objected to NET's failure to articulate any enforcement method, and there apparently would be no mechanism to prevent adverse environmental impacts during efforts to remedy violations. Moreover, NET has not deigned to address the concerns of Wilmington officials. At the close of the recent hearing, NET's counsel claimed that NET met with Wilmington officials three times. This is patently untrue and undocumented. NET conducted only unilateral information sessions that it scheduled without contacting or involving Wilmington's Board of Selectmen.

At bottom, any voluntary compliance would sidestep site suitability evaluation, thereby ignoring the threshold concern of Wilmington's citizens. NET has refused to

agree to regulatory controls that it believes would "unreasonably burden" its operation. That is a subjective and unworkable standard.

**III. NET's Statements Reflect a Disregard for the Environmental Implications of Its Proposal at the Olin Site. Such Misstatements and Misunderstandings Infected the Post-EA, Which This Board Wisely Terminated.**

NET's inconsistent and incomplete submissions can only skew any environmental permitting or review. As several parties demonstrated on April 19th, environmental concerns arising from solid waste processing are not theoretical. Massachusetts has avoided damage of the type described by Senator Lautenberg in New Jersey, because solid waste transloading in Massachusetts so far has involved only sealed rail cars or has been undertaken with valid site assignment permits.

This would change dramatically if NET were authorized to proceed without site assignment or other sufficient permitting. In his parting remarks at hearing, NET's representative incorrectly stated that the proposed facilities would occupy a portion of the Olin site that was not responsible for contamination of the aquifer. This is absolutely untrue. In fact, the proposed rail sidings appear to pass through "Plant B," which is the location of an active ground water recovery and treatment system. Moreover, NET has proposed to locate rail sidings and materials handling facilities directly on top of the existing containment system for the dense phase aqueous layer (DAPL) contaminant cell. While NET has said that it would assume Olin Chemical's obligation to construct a cap over this contaminated cell, its cost estimate of \$1 million is suspiciously low and it has provided no engineering data to indicate that the cap and the slurry walls of the

containment system beneath it could sustain enormous live and static loads from several thousand tons of truck and rail traffic and stockpiled materials

NET's parting representation also is disingenuous. NET last year did not argue that EPA's investigation and remediation would occur elsewhere. In fact, its petition argued that sprung structures later could be moved so that they would not interfere with clean-up activities. (Subsurface concrete bunkers, tipping floors and utilities, of course, cannot be removed so easily.) Moreover, NET recently has alluded to the conservation restriction that has been imposed on the 20 acres of Olin property adjacent to the 30 acres that it proposes to redevelop. That restriction was placed on those 20 acres as partial mitigation for the destruction of wetlands occasioned by necessary remedial work on the very 30 acres that NET would occupy – the most contaminated portion of the site

It was that contamination of the land on which NET proposes these facilities, and the aquifer beneath it, which forced Wilmington to close five of its eight public wells. NET's proposal would create an unprecedented burden on a complex Superfund site and the ecosystem and human population that surrounds it. That proposal cannot be allowed

to slip through a regulatory gap that lacks proper state site assignment review

Respectfully submitted.

TOWN OF WILMINGTON,  
By its attorneys,

*/s/ Daniel R. Deutsch*

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Date. April 30, 2007.

DW11B 210925v1  
8804/23